IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
March 28, 2006 Session

STATE OF TENNESSEE v. BRADLEY DAVID TOWNSEND

Direct Appeal from the Criminal Court for Roane County
No. 12376 E. Eugene Eblen, Judge

No. E2005-00115-CCA-R3-CD - Filed May 25, 2006

The defendant, Bradley Townsend, was indicted by the Roane County Grand Jury on one count of aggravated sexual battery and twenty-one counts of rape of child based on acts he committed against his eight-year-old stepdaughter over the course of a five-month period. Following a jury trial, he was convicted of the aggravated sexual battery count and of the lesser-included offense of aggravated sexual battery in one of the rape counts, but acquitted of the remaining rape counts of the indictment. The trial court subsequently sentenced him as a violent offender to concurrent eight-year terms at 100% release eligibility for each conviction. On appeal, the defendant contends that the evidence was insufficient to sustain his convictions, the trial court erred in not instructing the jury on misdemeanor assault and child abuse as lesser-included offenses of both rape of a child and aggravated sexual battery, and the State made improper and prejudicial comments in closing. Based on our review, we conclude that the evidence was sufficient to sustain the convictions, that the failure to instruct on the lesser-included offenses does not rise to the level of plain error, and that the prosecutor engaged in improper closing argument by referring to matters that were not in evidence but that the improper comments could not have influenced the jury's verdict. Accordingly, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed

ALAN E. GLENN, J., delivered the opinion of the court, in which JERRY L. SMITH and J.C. MCLIN, JJ., joined.

Joe H. Walker, District Public Defender, and Walter B. Johnson, II, Assistant Public Defender, for the appellant, Bradley David Townsend.

Paul G. Summers, Attorney General and Reporter; Jennifer L. Bledsoe, Assistant Attorney General; J. Scott McCluen, District Attorney General; and D. Roger Delp, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

On April 9, 2000, the victim's mother witnessed an episode that led her to believe that the defendant was sexually molesting her eight-year-old daughter. After questioning the victim,[1] she contacted the sheriff's department and took the victim to the hospital for a physical examination. Based in part on the results of that examination, as well as statements by the victim and the victim's mother, the Roane County Grand Jury returned an indictment on June 20, 2000, charging the defendant with one count of aggravated sexual battery, twenty-one counts of rape of a child, and one count of perjury. The perjury count of the indictment, however, was dismissed prior to trial.

The victim's mother, Joy Schrock, testified at the August 2003 trial that she married the defendant in November 1999 and divorced him in January 2001 after she learned that he had been sexually abusing the victim. At the time the events in the case transpired, she and the defendant lived together in Kingsport with her two children from a previous relationship: the victim, who was then eight years old, and the victim's younger brother, Noah, who was approximately six. In addition, the defendant had every-other-weekend custody of his six-year-old son, Jacob.

Schrock testified that the defendant was unemployed from November 1999 through April 2000 and during those months regularly awakened the children in the mornings while she prepared for work. She said she began to develop some vague concerns about his relationship with the victim a few weeks prior to the Sunday, April 9, incident she witnessed, but nothing definite occurred to arouse her suspicions until Friday morning, April 7. On that morning, she stepped out of her bathroom to find the defendant in her bed with the victim. Schrock explained that the victim had slept with her upstairs the previous night while the defendant had slept downstairs with Noah. She said the defendant jumped when he saw her and said, "[O]h, you scared me," which "didn't give [her] a good feeling."

Schrock testified that on April 9 she asked the defendant to go downstairs to attend to the laundry while she was upstairs cooking. While the defendant was downstairs, Noah, who had cerebral palsy, ADHD, and obsessive-compulsive disorder, began repeatedly calling to him from his high chair. Because something in the tone of the defendant's voice as he called back to Noah to wait a minute aroused her suspicions, she removed her shoes, tiptoed downstairs, and looked in the victim's bedroom. There, she saw the victim sitting on the defendant's lap with her dress partially hiked up and her legs spread over the defendant's legs while the defendant rubbed her vagina on the outside of her panties. Schrock recalled that she could see an obvious crease where the victim's panties had been pushed up into the folds of her vagina.

Schrock testified that when the defendant saw her, he jerked his hand away. She said she walked over to him and took hold of the victim's arms to pull her off his lap, but he held her by the

[1] In accordance with the policy of this court, we will not identify the minor victim by name.

waist in an effort to keep her in place. When she finally jerked hard enough to pull the victim from him, she saw that he had an erection. Remaining calm, she requested that he accompany her into the hall, where she asked him what he had been doing. The defendant, who was visibly nervous, told her that he had just been touching the inside of the victim's leg. In response, she told him what she had seen and did not want to discuss it further. Schrock said that the defendant was on his way to a funeral and that he left the house approximately thirty minutes later, at about 7:00 p.m.

Schrock testified that after the defendant left she went downstairs and questioned the victim about the incident. She said she had asked the victim approximately a year before if the defendant had ever touched her inappropriately and that she said he had not. On this occasion, however, the victim told her that it happened "practically every morning" and whenever Schrock was not at home. Questioned more closely, the victim told her that it occurred during the week in which the children had stayed home from day care with the defendant and when Jacob was at the home for his weekend visitation. Schrock testified that, based on what the victim told her, she was able to determine the specific dates of the offenses by consulting her calendar. She stated that the victim herself was able to identify two specific incidents by date: April 3 and April 7, 2000. She said the victim told her that "something was happening" on April 7 when Schrock came out of the bathroom to find the defendant in her bed with the victim, and that April 3 was the last time she remembered the defendant's penetrating her. Schrock testified that after talking to the victim, she went to the Roane County Sheriff's Department and spoke with a detective and a representative from the Department of Children's Services ("DCS"). She said she never again shared a home with the defendant and subsequently divorced him.

On cross-examination, Schrock acknowledged that she and the defendant initially kept their marriage a secret because his mother was opposed to their union. She acknowledged that the defendant lived and worked in Chattanooga for the first two months of their marriage until she asked him to quit his job and move to Kingsport to be with her because she was pregnant and did not want to live apart. She conceded that the defendant worked sporadically as a roofer after he moved to Kingsport and therefore, contrary to her direct examination testimony, was not completely unemployed during that time. Schrock further acknowledged that she did not see the defendant doing anything to the victim on the morning of April 7; that the victim regularly shared the victim's double bed with Noah and with Jacob during his weekend visits, which meant that both boys were present in bed with the defendant and the victim when some of the alleged incidents occurred; and that neither Noah nor Jacob had ever said anything to her about the incidents. Schrock also acknowledged she never found any evidence of blood or semen on the victim's clothing or bedding.

When questioned about the April 9 incident, Schrock expressed her certainty that she saw the defendant rubbing the victim's vagina, testifying that she watched the episode for approximately five seconds to be sure of what she saw before she intervened. She acknowledged she said nothing about the defendant's erection to a nurse during the May 1, 2000, visit to the Children's Hospital but insisted she had mentioned seeing the erection during her testimony at the first preliminary hearing, in which "the tape was no good." She testified, initially, that she had also mentioned, at the second preliminary hearing, having seen the defendant's erection when she pulled the victim from his lap.

However, when defense counsel told her she was wrong, she apparently conceded her mistake, saying, "Sorry." She acknowledged she had testified at that same hearing that she grabbed the defendant's crotch when they went into the hall, which was a detail she had neglected to mention during her direct examination trial testimony. Finally, she acknowledged that, after grabbing the defendant's crotch, she said something to him along the lines of she was sorry for thinking he had done something and that her hormones were acting up because she was pregnant.

Dr. John Williams, a specialist in pediatric emergency medicine, testified that he was on duty at the East Tennessee Children's Hospital during the late evening hours of April 9, 2000, when the victim's mother and a representative from Roane County Children's Services brought the victim to the hospital for an examination. He said he found no signs of bleeding or bruising on the victim and no abnormal dilations of her vagina or anus. He did, however, find a small tear to the victim's hymen, which, he said, "could [have] happen[ed] a multitude of different ways." Although he was unable to tell the exact time the injury occurred, he did not believe it had occurred within the "past hours to day" because he saw no signs of dried blood around the edges of the tear. Dr. Williams testified that injuries to the vagina heal quickly due to the area's rich blood supply and that it was possible for a tear to the hymen to heal without leaving any trace of injury. Therefore, he was not surprised to learn that the physician who examined the victim three weeks later was unable to detect the injury. Dr. Williams testified that, according to the literature he had reviewed, in approximately 75% of child sexual abuse cases the child's physical examination is normal. He stated that, based on his findings, he was unable to determine if the victim had been sexually penetrated.

On cross-examination, Dr. Williams acknowledged that the victim's hymen was intact with the exception of the defect or "questionable tear" that he had noted. He testified that the victim was consistent when describing digital penetration but inconsistent when describing penile penetration, in that her answers were not the same each time he asked her about it. He said he was not aware of any allegation of anal penetration at the time he performed the physical exam. He testified that the term "R/O sexual abuse," which he had written on the victim's medical records, meant "rule out sexual abuse." On redirect examination, he clarified that he wrote the term to reflect the reason the victim had been brought to the hospital and not to indicate that his physical examination had ruled out that she had been the victim of sexual abuse.

Linda Booth testified she was currently a 9-1-1 dispatcher but formerly worked as a detective with the Roane County Sheriff's Department and in that capacity spoke by telephone with the victim's mother on the evening of April 9, 2000. Based on that conversation, she arranged for a DCS worker to meet the victim and the victim's mother at the Children's Hospital. The next morning, the defendant was brought from the jail to her office for an interview. During the interview, the defendant provided his version of the previous evening's incident, telling her that the victim's dress had been up and that his hands had been "like this," as he stood and demonstrated by placing his hands on his upper inner thighs. Referring to her notes, Booth testified that, during the course of the interview, the defendant also said that the victim's mother believed the victim because she had no reason to disbelieve her; described himself as "real sexually active"; asked whether there would not have been blood if he had penetrated the victim with his finger or his penis; said the

victim was "real sexual"; told her that he got in bed with the children in the mornings; and said that he liked to cuddle with the victim. Booth identified the following written statement the defendant completed during the interview, which she read aloud for the jury:

> I don't know why [the victim] would say these things. I have tried to be the best stepfather I know how to be. When I would go to get in bed in the mornings with her, nothing inappropriate ever happened. She is my daughter and I love her very much. I could never do such a thing to any child.

On cross-examination, Booth acknowledged that she did not tape the interview and that it was possible the defendant had made other comments besides the statements she recorded in her notes. She testified she had written down everything she thought pertinent but admitted she had not recorded the questions she asked the defendant during the interview. She further acknowledged that she never questioned Noah or Jacob about the incidents. In explanation, she testified that the victim had told her that both boys were asleep when the incidents occurred. Finally, she conceded she swore out the defendant's arrest warrant after talking with the victim's mother and the DCS worker, who told her that the victim's physical examination had confirmed vaginal penetration.

The victim began her testimony by relating the April 9, 2000, incident that occurred in her bedroom, testifying that she was sitting on the defendant's lap watching television and the defendant was rubbing her on her front privates when her mother walked into the room and pulled her off his lap. She stated that the defendant was sitting on the couch in her bedroom, that her legs were over the outside of his legs, and that she believed "Smart Guy" was playing on the Disney Channel at the time. She testified that the defendant initially tried to hold her down as her mother pulled on her but that her mother succeeded in pulling her off his lap. She said her mother then asked the defendant to go into the hall with her. Later, after the defendant had left the house, her mother talked to her about what the defendant had been doing to her.

The victim testified that she had told her mother "no" on previous occasions when she had asked if the defendant had ever touched her inappropriately, even though he had, because she was scared and knew her mother loved the defendant. However, when her mother asked her again on the evening of April 9, she told her everything. The victim testified that the inappropriate touching "happened all the time." Referring to her vagina and anus as her front and rear private parts, respectively, and the defendant's penis as his front private part, she testified that the defendant regularly got into her bed with her in the mornings and, depending on her position at the time, put either his finger or his penis in her vagina or anus. She said the defendant once asked her if what he was doing "felt good," and she told him "no." She agreed that her brother slept in the bed with her and that the defendant's son slept there as well whenever he stayed over. She said that the defendant was always quiet and that she did not know whether the boys knew what was happening. She testified that she told her mother that the incidents happened during a week in which she stayed home from day care and during the times when the defendant's son was visiting in the home.

The victim testified that she usually slept in a long t-shirt and underwear. She said that on the Friday prior to the April 9 incident in which her mother walked into her bedroom to find her sitting on the defendant's lap, the defendant put his finger and his penis in her vagina when she was in her mother's bed and her mother was in the shower. She said that the defendant jumped when her mother came out of the shower, but she could not remember if her mother said anything to him at that time.

The victim testified she had never really liked the defendant, but she had no reason to lie about him. She said no one had told her what she should say during her trial testimony. On cross-examination, she acknowledged that the defendant had never threatened her or instructed her not to tell anyone about the abuse. She said she did not remember having testified in a preliminary hearing that the incidents happened once a week as opposed to every day. She was also unable to remember having previously said that she pretended to be asleep when the defendant came into the room or that the incident in her mother's bed occurred about a week before the April 9 incident. On redirect examination, she agreed that she was doing her best to recall events that had transpired three years before and that she would never intentionally not tell the truth.

The thirty-three-year-old defendant testified that he was a high school graduate and a decorated Navy veteran. He said he was living and working in Chattanooga before and after his November 1999 marriage to Schrock but, at her request, quit his job in January 2000 in order to move to Kingsport to live with her and her children. He adamantly denied that he had ever touched the victim in any inappropriate manner and gave the following version of the events that transpired on April 9, 2000. On that evening, he stopped by the victim's room after doing the laundry, took her on his lap, and began talking to her about not giving her mother a hard time while he was away from home attending a funeral. As he talked to her, his hands were on top of her legs, her hands were interlaced with his, and he was patting her on the top of her legs. After requesting permission, the defendant stood and demonstrated the position during his testimony. He said that Schrock called to him a few times and he answered that he would be there in a minute. She then came into the room, walked over to him, said, "I caught you, you son of a bitch," lifted the victim off his lap, and repeated, "I caught you, you son of bitch." He replied that he did not know what she was talking about and suggested that they discuss it in the hall.

When they reached the hall, Schrock grabbed his crotch and he said, "[I]f that's what you're talking about, I don't have an erection, as you see." At that point, she apologized, explaining that her hormones were "going crazy" and that she was "just emotional." They both then went upstairs and he ate his meal and kissed her goodbye before leaving for the funeral. When he returned later that evening, the house was dark and no one was home. As he was in the process of telephoning Schrock's relatives to find out where she was, deputies pulled into his driveway and arrested him on an outstanding warrant for driving on a suspended license. According to the defendant, the charge was later dismissed.

The defendant testified that he agreed to the interview with Detective Booth because he wanted to clear up the matter. He explained that his statement that the victim was "real sexual" was

in direct response to her question about whether the victim was sexual. He testified he added that the victim had been involved in a kissing episode at day care and had also been caught lying naked on top of another young girl, who was also naked, during a visit she had made to the other girl's home. The defendant denied that he ever told Booth that he cuddled with the children in bed. He testified that he instead told her that, at Schrock's request, he "went down every morning to sleep a little while longer with the kids, because she liked her morning time alone."

On cross-examination, the defendant testified that if he were guilty of the crimes, he would never have gone to trial but instead would have taken the eight years that had been offered by the State. He said that most mornings he got into bed and under the covers with the children and that he did not see anything inappropriate with the behavior. He denied that he ever put his hands between the victim's legs and said that Booth was lying when she testified that he had demonstrated, during his interview, having placed his hands on the victim's upper inner thighs.

ANALYSIS

I. Sufficiency of the Evidence

As his first issue, the defendant challenges the sufficiency of the evidence in support of his aggravated sexual battery convictions. In considering this issue, we apply the familiar rule that where sufficiency of the convicting evidence is challenged, the relevant question of the reviewing court is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560, 573 (1979); see also Tenn. R. App. P. 13(e) ("Findings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt."); State v. Evans, 838 S.W.2d 185, 190-92 (Tenn. 1992); State v. Anderson, 835 S.W.2d 600, 604 (Tenn. Crim. App. 1992). All questions involving the credibility of witnesses, the weight and value to be given the evidence, and all factual issues are resolved by the trier of fact. See State v. Pappas, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987). "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973). Our supreme court stated the rationale for this rule:

> This well-settled rule rests on a sound foundation. The trial judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere and the totality of the evidence cannot be reproduced with a written record in this Court.

Bolin v. State, 219 Tenn. 4, 11, 405 S.W.2d 768, 771 (1966) (citing Carroll v. State, 212 Tenn. 464, 370 S.W.2d 523 (1963)). A jury conviction removes the presumption of innocence with which a

defendant is initially cloaked and replaces it with one of guilt, so that on appeal, a convicted defendant has the burden of demonstrating that the evidence is insufficient. See State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982).

Aggravated sexual battery is defined, in pertinent part, as unlawful sexual contact with a victim by the defendant when the victim is less than thirteen years of age. Tenn. Code Ann. § 39-13-504(a)(4) (2003). "'Sexual contact' includes the intentional touching of the victim's . . . intimate parts, or the intentional touching of the clothing covering the immediate area of the victim's . . . intimate parts, if that intentional touching can be reasonably construed as being for the purpose of sexual arousal or gratification." Id. § 39-13-501(6). "'Intimate parts' includes the primary genital area, groin, inner thigh, buttock or breast of a human being." Id. § 39-13-501(2).

The defendant's convictions for aggravated sexual battery were based on the April 7, 2000, incident in Schrock's bedroom and the April 9, 2000, incident in the victim's bedroom. Viewed in the light most favorable to the State, the evidence at trial was sufficient to sustain both convictions. The defendant testified he regularly got into bed and under the covers with the children but denied that he ever touched the victim in any inappropriate manner. The victim, however, testified that the defendant touched her inappropriately all the time and that he put his finger and his penis in her vagina on the morning of April 7 when she was in her mother's bed. She also said that he jumped when her mother came out of the shower and saw him. Schrock, similarly, testified that the defendant jumped when she stepped out of the bathroom and discovered him in her bed with the victim that morning and that he said, "Oh, you scared me," which made her suspicious of his behavior. In apparent contrast to the victim's testimony that the defendant penetrated her during that incident, Schrock testified that the victim later told her that "something was happening" during the April 7 episode in Schrock's bed and that April 3 was the last time she remembered the defendant's penetrating her. By convicting the defendant of the lesser-included offense of aggravated sexual battery based on the April 7 incident, the jury obviously exercised its role as trier of fact by accrediting the testimony of the State's witnesses over that of the defendant and by reconciling any conflicts in the testimony to arrive at a verdict that was supported by the evidence at trial. This was its prerogative, and we will not disturb its findings.

With respect to the April 9 incident, the jury, again, obviously accredited the testimony of the victim and her mother over that of the defendant. He denied that he had touched the victim in an inappropriate way, demonstrated at trial that his hands had been on top of the victim's thighs and he had been patting her legs, and claimed that Booth lied when she testified that he demonstrated in his interview with her that his hands had been on the victim's upper inner thighs, or between her legs. However, both the victim and Schrock testified that the defendant was rubbing the victim's vagina over her underwear during that incident. Schrock testified that the rubbing had caused an obvious crease to appear in the victim's panties from where they had been pushed up into the folds of her vagina and that the defendant had an erection when she pulled the victim from his lap. Booth also testified that the defendant described the victim as "real sexual" and said that he liked to cuddle with her. This evidence was more than sufficient to sustain the defendant's conviction for aggravated sexual battery.

II. Lesser-Included Offenses

The defendant next contends that the trial court committed reversible error by not instructing the jury on misdemeanor assault and child abuse as lesser-included offenses of rape of a child and aggravated sexual battery. The State cites Tennessee Code Annotated section 40-18-110 (c) to argue that the defendant has waived this issue by his failure to request instructions on the lesser-included offenses at trial. The State also argues that any error in not instructing the jury on the lesser-included offenses was harmless beyond a reasonable doubt because the evidence of the defendant's guilt for aggravated sexual battery was "both uncontested and overwhelming."

In State v. Page, 184 S.W.3d 223 (Tenn. 2006), our supreme court made clear that a defendant's failure to make a written request for lesser-included offense instructions at trial results in a waiver of the issue on appeal. Id. at 230 (deciding in favor of the constitutionality of Tennessee Code Annotated section 40-18-110 (c), which provides that the trial court's failure to instruct the jury on a lesser-included offense cannot be presented as a ground for relief in either the motion for new trial or on appeal if the defendant has not made a written request for such instruction). Our supreme court also made clear, however, that in such a case an appellate court may still review the issue for plain error. Id.

The doctrine of plain error provides that where necessary to do substantial justice, an appellate court may take notice of a "plain error" not raised at trial if it affected a substantial right of the defendant. Tenn. R. Crim. P. 52(b). In order to review an issue under the plain error doctrine, five factors must be present: (1) the record must clearly establish what occurred in the trial court; (2) a clear and unequivocal rule of law must have been breached; (3) a substantial right of the defendant must have been adversely affected; (4) the accused must not have waived the issue for tactical reasons, and (5) consideration of the error is necessary to do substantial justice. See State v. Smith, 24 S.W.3d 274, 282-83 (Tenn. 2000) (adopting five factors set out in State v. Adkisson, 899 S.W.2d 626, 641 (Tenn. Crim. App. 1994)). "[A]n error would have to be especially egregious in nature, striking at the very heart of the fairness of the judicial proceeding, to rise to the level of plain error." Page, 184 S.W.3d at 231.

When an issue is raised regarding the trial court's failure to instruct on a lesser-included offense, our analysis typically involves a determination of: (1) whether the offense is a lesser-included offense under the test adopted in State v. Burns, 6 S.W.3d 453 (Tenn. 1999); (2) whether the evidence supports an instruction on the lesser-included offense; and (3) whether the failure to instruct on the lesser-included offense constitutes harmless error. State v. Allen, 69 S.W.3d 181, 187 (Tenn. 2002). In this case, the State concedes that misdemeanor assault and child abuse are lesser-included offenses of rape of a child and that misdemeanor assault is a lesser-included offense of aggravated sexual battery. We agree. See State v. Swindle, 30 S.W.3d 289, 292-93 (Tenn. 2000) (holding that Class B misdemeanor assault is a lesser-included offense of aggravated sexual battery), overruled on other grounds by State v. Locke, 90 S.W.3d 663 (Tenn. 2002); State v. Elkins, 83 S.W.3d 706, 711 (Tenn. 2002) (holding that both child abuse and Class B misdemeanor assault are lesser-included offenses of rape of a child). Furthermore, we agree with

the defendant that child abuse may, in some cases, be a lesser-included offense of aggravated sexual battery based on the victim's being less than thirteen years of age. See id. ("Clearly, the General Assembly has designated child abuse a lesser-included offense of any kind of 'sexual offense if the victim is a child.'") (quoting Tenn. Code Ann. § 39-15-401(d) (2003)).

The State further concedes that instructions on child abuse and misdemeanor assault were warranted for the rape of a child offense and that an instruction on misdemeanor assault was warranted for the aggravated sexual battery offense. In determining whether an instruction on a lesser-included offense is warranted, a court must first consider whether any evidence exists that reasonable minds could accept in support of the lesser-included offense and then whether the evidence, viewed in the light most favorable to the existence of the lesser-included offense, is legally sufficient to support a conviction for the lesser-included offense. Allen, 69 S.W.3d at 187 (quoting Burns, 6 S.W.3d at 469). In so doing, the court must consider the evidence liberally, in a light most favorable to the existence of the lesser-included offense, without making any judgments on the credibility of the evidence. State v. Ely, 48 S.W.3d 710, 722 (Tenn. 2001); Burns, 6 S.W.3d at 469. Furthermore, it is the evidence, and not the theory of the parties, which a court considers in determining whether an instruction on a lesser-included offense is warranted. Allen, 69 S.W.3d at 188.

"Child abuse" occurs when a person "knowingly, other than by accidental means, treats a child under eighteen (18) years of age in such a manner as to inflict injury." Tenn. Code Ann. § 39-15-401(a) (2003). "Bodily injury" is "a cut, abrasion, bruise, burn or disfigurement; physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty." Tenn. Code Ann. § 39-11-106(2) (2003). Misdemeanor assault is defined as when a person "[i]ntentionally or knowingly causes physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative." Tenn. Code Ann. § 39-13-101(a)(3) (2003). Thus, for the jury to find the defendant guilty of child abuse for the April 7 and April 9 incidents, it would have had to conclude that the defendant knowingly, other than by accidental means, treated the victim in such a way as to cause her physical injury. For the jury to find the defendant guilty of misdemeanor assault for the April 7 and April 9 incidents, it would have had to find that the defendant touched the victim in a manner that a reasonable person would have regarded as extremely offensive or provocative.

Based on the testimony by Dr. Williams about the injury to the victim's hymen, the State concedes that the evidence was sufficient to warrant an instruction on child abuse and misdemeanor assault with respect to the April 7 incident and an instruction on misdemeanor assault with respect to the April 9 incident. We agree there was evidence that reasonable minds could accept in support of those offenses, and such evidence, viewed in the light most favorable to the existence of the lesser-included offenses, was legally sufficient to support convictions for child abuse and misdemeanor assault.

While denying that he ever touched the victim in an inappropriate way, the defendant acknowledged that he regularly got into bed and under the covers with the eight-year-old victim and

that he did not see anything inappropriate with such behavior. Detective Booth testified that the defendant told her that he liked to "cuddle" with the victim and that he demonstrated having placed his hands on the victim's upper inner thighs. The victim's mother also testified that when she confronted the defendant after witnessing the April 9 incident, he told her he had just been touching the inside of the victim's legs. Viewed in the liberal light required by the second step of our inquiry, such evidence was sufficient to warrant instructions on child abuse and assault as lesser-included offenses of rape of a child based on the April 7 incident and an instruction on misdemeanor assault as a lesser-included offense of aggravated sexual battery based on the April 9 incident. However, in light of Dr. Williams' testimony that the injury to the victim's hymen was not recent, the evidence at trial was insufficient to warrant an instruction on child abuse for the April 9 aggravated sexual battery offense.

The last step of our inquiry requires us to determine if the trial court's failure to instruct on the lesser-included offenses was harmless beyond a reasonable doubt. See Ely, 48 S.W.3d at 725. "[I]n deciding whether it was harmless beyond a reasonable doubt not to charge a lesser-included offense, the reviewing court must determine whether a reasonable jury *would* have convicted the defendant of the lesser-included offense instead of the charged offense." State v. Richmond, 90 S.W.3d 648, 662 (Tenn. 2002). Thus, when a reviewing court is determining whether a lesser-included instruction error was harmless beyond a reasonable doubt, it "should conduct a thorough examination of the record, including the evidence presented at trial, the defendant's theory of defense, and the verdict returned by the jury." Allen, 69 S.W.3d at 191.

The State contends that the failure to instruct the jury on the lesser-included offenses was harmless error because "no reasonable juror would have convicted the defendant of any lesser-included offenses." The State bases this argument, in part, on the fact that the defendant adamantly denied having touched the victim in any inappropriate fashion. However, by maintaining that he saw nothing inappropriate in climbing in bed each morning with an eight-year-old stepdaughter and by demonstrating to Detective Booth, apparently in the belief that it would show he had done nothing wrong, that his hands had been on the victim's upper inner thighs, the defendant revealed that his view of what constitutes inappropriate behavior or "offensive touching" may not be the same as that of the "reasonable person." Thus, based on the entire evidence at trial, including Dr. Williams' testimony that the injury to the victim's hymen could have occurred in any number of different ways, we are unable to conclude beyond a reasonable doubt that no reasonable juror would have convicted the defendant of the lesser-included offenses.

The defendant, however, bears the burden of persuasion with plain error claims, see State v. Corey C. Abernathy, No. E2005-00266-CCA-R3-CD, 2005 WL 3447672, at *6 (Tenn. Crim. App. Dec. 14, 2005) (citing United States v. Olano, 507 U.S. 725, 732-37 (1993)), and in this case has not shown that his failure to request the lesser-included instructions was not part of his defense tactics at trial. Therefore, we cannot conclude that the trial court's failure to instruct the jury on the lesser-included offenses rises to the level of plain error.

III. Improper Closing Argument

As his last issue, the defendant contends that the prosecutor engaged in improper closing argument that unfairly prejudiced the outcome of his case and entitles him to a new trial. Specifically, he argues that the prosecutor improperly used the transcript of the preliminary hearing, which was not admitted in evidence at trial, and improperly testified about the State's plea offer to the defendant. He further argues that when defense counsel objected, the prosecutor deliberately complained to the trial court in a voice loud enough to be overheard by the jury that defense counsel was engaging in improper argument. The defendant asserts that the prosecutor's actions "made it appear that [defense counsel] was not only dishonest but hiding important matters from the jury." The State responds by arguing that the prosecutor's rebuttal summation was proper. In the alternative, the State argues that even if the prosecutor engaged in improper argument, his actions did not affect the jury's verdict.

Tennessee courts "have traditionally provided counsel with a wide latitude of discretion in the content of their final argument" and trial judges with "wide discretion in control of the argument." State v. Zirkle, 910 S.W.2d 874, 888 (Tenn. Crim. App. 1995). A party's closing argument "must be temperate, predicated on evidence introduced during the trial, relevant to the issues being tried, and not otherwise improper under the facts or law." State v. Middlebrooks, 995 S.W.2d 550, 557 (Tenn. 1999). The five generally recognized areas of prosecutorial misconduct in closing argument occur when the prosecutor intentionally misstates the evidence or misleads the jury on the inferences it may draw from the evidence; expresses his or her personal opinion on the evidence or the defendant's guilt; uses arguments calculated to inflame the passions or prejudices of the jury; diverts the jury from its duty to decide the case on the evidence by injecting issues broader than the guilt or innocence of the accused under the controlling law or by making predictions on the consequences of the jury's verdict; and intentionally refers to or argues facts outside the record, other than those which are matters of common public knowledge. State v. Goltz, 111 S.W.3d 1, 6 (Tenn. Crim. App. 2003).

For a defendant to be entitled to a new trial on the basis of allegedly improper remarks during the closing argument, they must be shown to have prejudiced the case by affecting the jury's verdict. Middlebrooks, 995 S.W.2d at 559. In determining whether this occurred, we consider the following factors: (1) the conduct viewed in light of the circumstances and facts in the case; (2) any curative measures taken by the trial court and the prosecution; (3) the prosecutor's intent in making the improper statements; (4) the cumulative effect of the prosecutor's statements and other errors in the record; and (5) the relative strength and weakness of the case. Id. at 560.

We agree with the defendant that the prosecutor's attempt to use the transcript of the preliminary hearing, as well as his statement about the State's plea offer, was improper. However, we disagree that the improper conduct affected the jury's verdict. Because our determination that the prosecutor's improper comments do not justify a new trial depends upon the context in which the comments arose, we will set them out in some detail. Both instances of improper argument occurred during rebuttal and obviously were in response to statements that defense counsel had made

in closing. During closing argument, defense counsel told the jury that it should consider the fact that Schrock had told a different story at trial than she had told "any of the other times, " in that she had "never said anything [in prior proceedings] about seeing an erection." Later, defense counsel implied that the defendant's testimony about the State's alleged eight-year offer was the truth:

> Are these witnesses telling the truth? Is [the defendant] telling the truth? Well, the Attorney General asked [the defendant], you would lie. You wouldn't tell us the truth if you were sitting in that stand, and you had done this, would you? What did he say? He said I wouldn't be here. I would have taken the deal that you cut with me. I wouldn't sit here and risk 20 years. I would have taken your eight year offer. That's what he said. He would not be on that stand. He would not have subjected these people to this trial. That's what he testified to. And we know that that's true. That's a fact.

In rebuttal, the prosecutor made the following statement to the jury:

> Now, [defense counsel] has told you -- and I think incorrectly so -- that Joy Schrock did not testify over in Sessions Court that this defendant had an erection when she pulled her daughter off his lap. Well, you notice he was using one of these when he was asking her questions. Well I would challenge you all to look on page 4, line 13 –

Defense counsel objected, arguing that the prosecutor could not use the transcript because it was not in evidence. The prosecutor answered that he was entitled to respond to defense counsel's comment. At the ensuing bench conference, the following exchange occurred:

> [PROSECUTOR]: [Defense counsel] just told this jury –
>
> [DEFENSE COUNSEL]: Talk a little bit lower or they're going to hear.
>
> [PROSECUTOR]: The Court needs to hear me and the microphone needs to hear me.
>
> He told this jury that she did not testify that he had an erection over in Sessions Court, line 13.
>
> [DEFENSE COUNSEL]: I'm sorry. I didn't say (indiscernible) --
>
> [PROSECUTOR]: Certainly that's wrong, and it has to be corrected one way or the other.
>
> [DEFENSE COUNSEL]: Well that's not what I said.
>
> [PROSECUTOR]: It's exactly what you said, that she never testified to that –

[DEFENSE COUNSEL]: I said she never testified that she saw he had an erection.

[PROSECUTOR]: Well, how the hell would she know –

[DEFENSE COUNSEL]: Well, I (indiscernible). What I said was, she went out in the hall, and said she felt his erection.

As the bench conference continued, the prosecutor and defense counsel continued to argue about what defense counsel had said in his closing argument. Defense counsel's exact argument at the bench conference, however, was apparently made in too low a voice for the court reporter to interpret what he was saying. At the conclusion of the conference, the trial court ruled that the prosecutor could not refer to the preliminary hearing transcript, which was not in evidence, but could comment to the jury about defense counsel's statement and remind the jury that it should use its own memory with respect to the testimony. Thereafter, the prosecutor made the following statement to the jury:

> Ladies and gentleman, again, use your own memory. Don't use mine. Don't use [defense counsel's]. You are the arbiter and the finder of the facts, and certainly not us. And as I said, I'm not suggesting [defense counsel] would ever tell you anything that he knew was wrong. But he's not infallible. He's not under oath. He's not a witness.

The record reveals that the prosecutor's improper comment as to the State's plea offer occurred at the end of his rebuttal when he stated:

> Now, ask yourself these questions when you get back to the jury room. What is there to gain from Joy Schrock and her child to testify? What? They're here under subpoena. What do they gain? What does this defendant have to lose or gain? And by the way, we never offered him eight years. That's the minimum for aggravated sexual battery. He was not offered that.

Defense counsel requested a bench conference, where the following occurred:

> [DEFENSE COUNSEL]: The Attorney General is testifying about that previous offer. He could have asked the defendant about that. And he could have asked him about it, and not testify himself about what they offered. That is inappropriate and improper at this time.
>
> [PROSECUTOR]: Your Honor, the defendant said he was offered eight years. The only thing I can do about that is say no, you weren't, and he would say, yes, I was. That's something he should have never said to start with. And [defense counsel] should have left it alone.

[DEFENSE COUNSEL]: Well, that was the evidence in the record. [The prosecutor] had plenty of opportunity to cross examine the defendant about that. He chose not to ask any more questions about it. And I think we're stuck with the record as it is.

[PROSECUTOR]: Well, that's a pretty pitiful excuse for him getting up and repeating it, when he knows it wasn't true.

THE COURT: Well –

[DEFENSE COUNSEL]: I can't gloss over the record, and say something that's not there. I mean, I have to go with (indiscernible).

[PROSECUTOR]: Well, if it's wrong and you know it, you're obligated not to repeat it.

THE COURT: I let him comment on it.

[PROSECUTOR]: Your Honor, I'm through. That's all I'm going to say about that.

When the prosecutor completed his rebuttal summation, defense counsel suggested that the jurors should be informed of what the offer really was because to do otherwise would leave them with the impression that there had been no offer. The trial court, however, denied his request.

Placed in context, we do not believe that the prosecutor planned the improper comments in advance or that his intent was to bolster Schrock's testimony at a point in the trial when she would be beyond the reach of defense counsel's cross-examination. Although in no way condoning the prosecutor's improper comments, we are mindful that they were occasioned, in large part, by defense counsel's misleading comments to the jury during his closing arguments. We also believe that the prosecutor's and the trial court's instructions to the jurors that they should rely on their own memory and disregard any statements by counsel that they did not believe to be supported by the evidence were sufficient to cure any prejudice that might have been caused by the improper comments. Given these circumstances, we conclude that the prosecutor's improper comments did not affect the verdicts in the case.

CONCLUSION

Based on the foregoing authorities and reasoning, we affirm the judgments of the trial court.

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ALAN E. GLENN, JUDGE